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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 64

EASTERN AIR LINES, INC., PETITIONER

v.

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of May 17, 1965, inviting the Solicitor General to express the views of the United States with respect to this case.

STATEMENT

Petitioner, a carrier by air within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. 181, brought this action in the district court against the

then-certified collective bargaining representative of its flight engineer employees to enjoin, and for damages allegedly caused by, a strike which the Union had called against petitioner. The complaint charged that the strike, which lasted from February 17 to February 23, 1961, violated both the Railway Labor Act and the collective bargaining agreement between the parties (Pet. App. 30-31). It alleged that the strike had no connection with any dispute between the union and petitioner, but was to protest the report of a committee appointed by the National Mediation Board to resolve a craft dispute on another airline (Pet. App. 30);[1] that it was part of a general strike against all major airlines by employees represented by the Flight Engineers in an attempt to put pressure upon the Board to reject the recommendations of the committee (*ibid.*); that, at the time of the strike, the parties were bargaining with respect to a new con-

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[1] Under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, the National Mediation Board may itself designate who shall participate in an election to resolve representation disputes, or it may appoint a committee of three neutral persons to make the designation. The dispute giving rise to the strike at Eastern Air Lines was between the United Air Lines Chapter of the Flight Engineers' International Association and the Air Line Pilots Association over whether pilots and flight engineers on United constituted a single craft or two crafts. The Board appointed a committee of neutrals which, after hearings and investigation, held that such pilots and flight engineers constituted a single craft. *In the Matter of Representation of Employees of the United Air Lines, Inc.*, File No. C-2946 (1961), 3 Determination of Craft or Class of the National Mediation Board, p. 56. See *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905 (C.A.D.C.), certiorari denied, 368 U.S. 956.

tract (Pet. App. 30-31); that the dispute over the new contract had been docketed before the Board as a so-called "major dispute" within the meaning of Sections 5, First and 6 of the Railway Labor Act, 45 U.S.C. 155, First and 156 (Pet. App. 31); and that the strike was totally unrelated to such dispute (Pet. App. 31).

Petitioner's complaint was filed at the beginning of the strike, and sought injunctive relief as well as compensatory and punitive damages (Pet. App. 31). The termination of the strike rendered the claim for injunctive relief moot, and the litigation proceeded as a claim for damages (Pet. App. 31).

The district court, holding that diversity of citizenship was lacking and that petitioner had failed to allege a cause of action under the Railway Labor Act, dismissed the complaint for lack of jurisdiction (Pet. App. 39-40). The court of appeals affirmed. It discussed but rejected three possible bases for federal jurisdiction.

First, the court held that the Railway Labor Act itself does not render the strike unlawful (Pet. App. 32-34). The court stated that the Act prohibits strikes only (Pet. App. 32):

> (1) where the compulsory adjustment procedures provided for in the Act are being pursued in connection with a "minor" dispute * * * and (2) where the National Mediation Board procedures, as provided in the Act, have not been concluded where a controversy involves a "major" dispute.

It ruled that since the strike here had no connection with either a minor or major dispute—since it did not

relate to the dispute between Eastern and the Union then pending before the National Mediation Board—the Act did not bar it (Pet. App. 33).

Second, with regard to the allegation that the strike violated the collective bargaining agreement, the court held that, unlike Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185(a), the Railway Labor Act does not give the federal courts jurisdiction over suits based upon violations of collective bargaining agreements between persons subject to the latter Act (Pet. App. 34).

Third, the court held that petitioner's allegation that the strike interfered with its obligation to carry the United States mail, constituted an interference with interstate commerce, and prevented petitioner from carrying out its duties under its certificate of public convenience and necessity, furnished no basis for federal court jurisdiction (Pet. App. 34-35).

DISCUSSION

1. The principal question is whether, during the period in which the mediatory machinery of the Railway Labor Act is being utilized in an attempt to settle a "major" dispute between a carrier and its employees, the Act bars the employees from striking over an unrelated dispute that is not subject to the Act's mediatory provisions. If the Act does prohibit such a strike, the federal courts have jurisdiction to grant appropriate relief to correct the statutory violations. See *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548; *Virginian Ry.* v. *Federation*, 300 U.S. 515; *Tunstall* v.

Brotherhood, 323 U.S. 210, 213; *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 235, 238; *Railroad Trainmen* v. *Howard*, 343 U.S. 768; *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 41-42; *Machinists* v. *Central Airlines*, 372 U.S. 682, 690. (We discuss below, pp. 11-13, the question whether in such circumstances the appropriate relief may include damages as well as an injunction.)

As this Court has noted, the chief purpose of the Railway Labor Act was to prevent strikes and the resulting disruption of the national transportation system. *Texas & N.O.R. Co.* v. *Ry. Clerks*, *supra*, 281 U.S. at 561-566; *Virginian Ry.* v. *Federation*, *supra*, 300 U.S. at 542-543, 545-547, 553; *Slocum* v. *Delaware, L. & W.R. Co.*, 339 U.S. 239, 242; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 611; *Machinists* v. *Central Airlines*, *supra*, 372 U.S. at 687. To achieve this purpose, Congress established machinery for the handling of three categories of disputes which had been productive of strikes, and imposed certain limitations on the right to strike while that machinery was being utilized.

a. The determination of so-called "minor" disputes between employees and a carrier, *i.e.*, those growing out of grievances or out of the interpretation or application of collective bargaining agreements, is covered by Sections 3 and 204 of the Act, 45 U.S.C. 153 and 184. Congress provided for negotiation and, if negotion is unsuccessful, for compulsory arbitration by various adjustment boards. While the Act does not expressly forbid strikes over these minor disputes, this Court held in *Trainmen* v. *Chicago R. & I. R. Co.*,

supra, 353 U.S. 30, that it bars a strike over minor disputes which have been submitted, as the statute requires, to the appropriate adjustment board.

b. Congress provided a more detailed procedure for the resolution of so-called "major" disputes between a carrier and its employees, which concern changes in pay, rules or working conditions, as well as of "any other dispute not referable to" the appropriate adjustment board.[2] These disputes are to be resolved through a process which first includes conferences; then, if conferences are unsuccessful, mediation by the National Mediation Board; next, if mediation fails, a request by the Board that the parties submit to binding arbitration; and finally, if such request is rejected and the Board believes that the dispute threatens substantially "to deprive any section of the country of essential transportation service," the appointment by the President of an emergency board which is to investigate the dispute and make a report thereon to the President within 30 days. The statute provides that, after the creation of such Board and for 30 days after it has made its report, the parties to the controversy shall make "no change, except by agreement * * * in the conditions out of which the dispute arose" (Section 10, 45 U.S.C. 160). A strike would seem to be a "change * * * in the conditions out of which the dispute arose," and therefore specifically prohibited during the period specified. It would further seem that the statutory prohibition upon the

[2] Sections 5, First (b) and 203(b) of the Railway Labor Act, 45 U.S.C. 155, First (b) and 183(b).

right to strike is not limited to that period, but applies as long as any of the procedures for the resolution of a major dispute is being employed. Although this Court has not directly decided the question, it stated in *Elgin, J. and E.R. Co.* v. *Burley*, 325 U.S. 711, 725:

> The parties are required to submit to the successive procedures designed to induce agreement. * * * But compulsions go only *to insure that those procedures are exhausted before resort can be had to self-help* [emphasis supplied].

See also, *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 290-291.[3] But once the statutory machinery has been exhausted, the employees may strike, and the Norris-LaGuardia Act prohibits a federal court from enjoining such a strike. *Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50; *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330;[4] *Locomotive Engineers* v. *B. & O.R. Co.*, 372 U.S. 284.

c. The third type of controversy that Congress believed was productive of strikes was disputes among

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[3] See also, *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 39, 42, 45 (C.A. 4), certiorari denied, 355 U.S. 914; *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, 66 (C.A. 2); *Pan American World Airways* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 840, 846 (C.A. 2).

[4] In the *Telegraphers* case the procedures of the Railway Labor Act had been exhausted. See 362 U.S. at 349-350 (dissenting opinion of Mr. Justice Whittaker). Compare *Florida E.C. Ry. Co.* v. *Brotherhood of R.R. Trainmen*, 336 F. 2d 172, 181-182 (C.A. 5), certiorari denied, 379 U.S. 990, followed in *Florida E.C.R.* v. *United States*, C.A. 5, No. 22134, decided July 21, 1965.

employees over the selection of their representative and over the craft lines along which they should organize. See *Virginian Ry.* v. *Federation, supra*, 300 U.S. at 545.[5] In Section 2, Ninth, 45 U.S.C. 152, Ninth, Congress directed the National Mediation Board to resolve representation disputes, to determine (either itself or through committees which it appointed) the crafts in which representation elections should be held, and to certify the representative to the carrier. The Act compels the carrier to bargain with the certified representative. Although the Act is silent as to whether a strike over a representation dispute is permissible during the period when the Board is considering the dispute, the same considerations which led this Court to conclude that the Act prohibits strikes over major and minor disputes while Board procedures are being utilized would seem applicable to representation disputes, and to require the same negative conclusion.

In sum, in the Railway Labor Act Congress attempted to prevent strikes and the resulting interruptions to the nation's transportation facilities by providing comprehensive procedures to resolve disputes between carriers and their employees and among

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[5] The Court there noted:

> Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided.

the employees themselves. As to certain types of disputes, the statutory procedures provide for a final binding resolution. As to other types, they provide the machinery by which the parties can settle the dispute, and to facilitate such settlement the Act bars strikes until such procedures have been exhausted.

In support of petitioner's position, it can be argued that the congressional plan to bar the use of strikes during the period when the machinery of the Board is being utilized requires the prohibition of all strikes against the carrier during that period, and not just those arising out of the particular dispute then before the Board. The National Mediation Board has advised that it believes that permitting employees to strike over another dispute at a time when a major dispute to which such employees are parties is going through the negotiation and mediation procedures of the Railway Labor Act, would lessen the likelihood of the parties resolving the major dispute. For the Board, on the basis of its many years of experience in the field, believes that the threat of a strike if negotiation or mediation fails is an important inducement to the parties to settle their differences. Thus, allowing employees to strike about a dispute over which the Board has no jurisdiction while the Board is attempting to mediate a major dispute would tend to thwart the basic congressional plan of substituting negotiation and mediation for self-help in the resolution of labor disputes involving rail and air carriers.

On the other hand, the fact that Congress has not attempted to give the Board jurisdiction over all labor

disputes in the rail and air transportation industry,[6] might indicate that in disputes not subject to the Railway Labor Act Congress intended to place no similar restrictions upon the weapons available to the parties. The Act does not explicitly deny the right to strike during the period that the Board's processes are being utilized, but has been interpreted to do so implicitly because such limitation was deemed necessary to make effective the mediatory machinery that Congress provided. In these circumstances, the strong federal policy against the use of injunctions in labor disputes reflected in the Norris-LaGuardia Act would seem to suggest that Congress intended to permit employees to continue to use the strike as an economic weapon except in the three categories of disputes over which the Board has jurisdiction. This view is further supported by the words of the statute. The only language which relates to strikes is the provision in Section 10 (45 U.S.C. 160) that, during the period from the creation of a Presidential Emergency Board in a major dispute to 30 days after it has made its report to the President, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." Since this provision merely prohibits a strike with respect to the dispute before the Presidential Board, it

[6] The Board, for example, had no jurisdiction over the strike in the present case which the Flight Engineers called against Eastern because of the Committee's ruling in a case involving another carrier (United), in an alleged attempt to put pressure on the Board to reject that ruling.

would seem that Congress merely froze that dispute but did not prohibit during that period other strikes which grew out of other disputes.

While the United States is not now prepared to state its views on the merits, we believe that the question is an important one in the administration of the Railway Labor Act which warrants resolution by this Court. The fact, which respondents stress (Brief in Opp. 7-8), that this apparently is the first court case on the issue is not necessarily an accurate barometer of the importance of the question. The application of current and future developments in the field of automation to the railroad industry is likely to result in substantial changes in work allocations and labor requirements, and disputes between employees and carriers over the method for effectuating such changes are bound to occur. The decision below, by denying the federal courts jurisdiction to act with respect to a strike on one carrier called to support the union in its dispute with another carrier, would be likely to have a substantial impact upon the resolution of major labor disputes.

2. A second question is whether, if the Act prohibits a carrier's employees from striking at all during the period that the Board has a major dispute under consideration, the relief which the federal courts may grant against such violation includes the award of damages as well as an injunction. In the present case, the strike has long since ended, and the only controversy in this case between the parties involves Eastern's claim for compensatory and punitive damages.

The theory upon which federal courts have jurisdiction to enjoin a strike arising out of a labor dispute that is subject to the mediatory machinery of the Railway Labor Act is that Congress, by creating such machinery, impliedly modified the Norris-LaGuardia Act's prohibition upon the issuance of injunctions in labor disputes for the relatively brief period during which the Board's machinery is being used. To the extent that the Railway Labor Act does not prohibit particular types of strikes, Norris-LaGuardia would bar a district court from enjoining them. But Norris-LaGuardia does not prohibit an award of damages. It provides that "[n]o court of the United States * * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute * * *" (Section 1, 29 U.S.C. 101); the inhibitory effect which the possibility of a damage award might have upon the exercise of the employees' right to strike does not bring such an award within the prohibition. Where the requirements of the Railway Labor Act that are designed to protect individual rights have been violated, this Court has held that the federal courts may provide redress by way of damages as well as injunction. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood*, 323 U.S. 210. The present case, however, does not involve the deprivation of individual rights, and the theory upon which any violation of the Railway Labor Act would rest is the need to prevent strikes in order to make the mediatory processes of the National Mediation Board more effective. In such circumstances, it may be that an injunctive remedy alone is appropriate.

Cf. *Louisville & N.R. Co.* v. *Brown*, 252 F. 2d 149, 154-155 (C.A. 5), certiorari denied, 356 U.S. 949; *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366, 372, n. 7 (C.A. 2), certiorari denied, 375 U.S. 830.

This question, like the first one, is also difficult. It is important, however, and in view of the close relationship between the two questions, we believe that if the Court undertakes to decide the first one, it should also resolve this one.

3. The third question is whether, if the Union's strike did not violate the Railway Labor Act and the federal courts therefore correctly held that they have no jurisdiction over the carrier's claims based on such violation, they have jurisdiction over the claim for damages based on the Union's alleged breach of the collective bargaining agreement. There is nothing in the Railway Labor Act comparable to the grant of jurisdiction in Section 301 of the Labor-Management Relations Act (29 U.S.C. 185) to the federal courts to entertain suits between employers and unions for breach of contract, and the issue is whether the general scheme of the Railway Labor Act warrants implying such jurisdiction. The answer depends to a considerable extent on the issues of the scope of the Act, which we have urged warrant resolution by this Court. See *Machinists* v. *Central Airlines*, 372 U.S. 682; *Republic Steel* v. *Maddox*, 379 U.S. 650. This issue, however, is quite distinct from the others, and at this time we cannot state that it is of sufficient importance in the administration of the Act to warrant resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented which, we believe, comprehends the issues discussed in points 1 and 2 of this memorandum.

Respectfully submitted,

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